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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, July 5, 2001

COMMONWEALTH OF VIRGINIA, ex rel.

DELTA RESOURCES, INC.,
Complainant,

v.

CASE NO. PST990004

VIRGINIA ELECTRIC AND POWER COMPANY,
Defendant.

FINAL ORDER DISMISSING COMPLAINT

On December 6, 1999, Delta Resources, Inc. ("Delta") a Tennessee corporation owning coal reserves in Southwestern Virginia, filed with the State Corporation Commission ("Commission") a formal complaint against Virginia Electric and Power Company ("Virginia Power"), a Virginia public service company engaged in the business of furnishing electric power. Delta challenges Virginia Power's use of the Virginia Coal Employment and Production Incentive Tax Credit (the "Tax Credit")¹ in connection with purchases of Virginia-produced coal for resale.

The Tax Credit statute, § 58.1-2626.1 of the Code of Virginia, affords to "every corporation in the Commonwealth doing the business of furnishing water, heat, light or power

¹ Va. Code § 58.1-2626.1.

. . ., whether by means of electricity, gas or steam . . . a credit against the tax imposed by § 58.1-2626" Section 58.1-2626 presently imposes on such corporations an annual license tax based on their gross receipts. Section 58.1-2626.1 prescribes the amount of the credit, which is based on "each ton of coal contracted for and consumed by such corporation" ²

Section 58.1-2626.1 was amended at the 2000 Session of the General Assembly. Prior to the 2000 amendment, the phrase "and consumed" did not appear in the Tax Credit statute. The Act, as amended, directs that the new provision "shall be effective for tax years beginning on and after January 1, 2001." ³ The Act further states that "[t]hese provisions shall not, however, be applicable to any contracts to purchase coal whose bid closing dates are before the introduction date of this bill." ⁴

By Preliminary Order of December 15, 1999, the Commission docketed Delta's formal complaint pursuant to former Rule 5:6 of the Commission's Rules of Practice and Procedure ⁵ and, among

² Id. (emphasis supplied.)

³ 2000 Va. Acts ch. 929.

⁴ Id. In addition, this Act amended other provisions of Title 58.1 to account for the change from the tax on gross receipts to an income tax for electric suppliers. See Va. Code §§ 58.1-400.2; 58.1-433.1. This change in taxation brought on by the Virginia Electric Utility Restructuring Act, Va. Code § 56-576 et seq., is not pertinent to this proceeding.

⁵ The Commission's Rules of Practice and Procedure were amended effective June 1, 2001.

other things, directed Virginia Power to file a response and assigned the matter to a Hearing Examiner to conduct all further proceedings.

The pleadings filed in this matter subsequent to Delta's initial formal complaint include: Virginia Power's motion to dismiss; Delta's reply to the motion to dismiss and an amended complaint filed by Delta on February 11, 2000; Virginia Power's motion to dismiss Delta's amended complaint; and Delta's reply to the motion to dismiss its amended complaint.

Delta asserts in its amended complaint that Virginia Power engages in the purchase of Virginia-produced coal for resale to out-of-state consumers at a profit and that Delta is aggrieved by these actions. Delta states that Virginia Power has utilized the Tax Credit described above with respect to purchases of coal for resale. Delta asserts that use of the tax credit has given Virginia Power an overwhelming advantage in the coal market against any other party attempting to sell Virginia coal to out-of-state consumers.

According to Delta, the Tax Credit was intended to act as an incentive to utilities in the Commonwealth to consume Virginia coal rather than coal produced in neighboring states; and the statute does not contemplate or intend for the Tax Credit to be used with respect to coal purchased for resale. Delta states that the legislative history of

§ 58.1-2626.1 of the Code of Virginia makes this point clear. Delta avers that Virginia Power's use of the Tax Credit in connection with coal purchases for resale is unlawful, has caused Delta to suffer substantial damages in the nature of lost royalties by artificially lowering market prices for Virginia coal, and has caused disruption in the markets for Virginia coal.

Delta's amended complaint argues that Virginia Power's use of the Tax Credit as described has violated the Virginia Antitrust Act,⁶ the Commerce Clause⁷ and Equal Protection Clause⁸ of the United States Constitution and that it constitutes an abuse correctable by the Commission pursuant to our authority under §§ 56-35 and 12.1-12 of the Code of Virginia.

Delta seeks from the Commission a declaration that Virginia Power's use of the Tax Credit for coal for resale is unlawful and a permanent injunction prohibiting such use, as well as a finding that Virginia Power be required to refund the amount of any Tax Credit claimed in connection with Virginia coal it purchased and resold.

Virginia Power moved to dismiss Delta's amended complaint. Virginia Power contends that Delta lacks standing to maintain

⁶ Va. Code § 59.1-9.2 et seq.

⁷ U.S. Const., art. I, § 8, cl. 3.

⁸ U.S. Const., amend. 14, § 1.

its claims because it is not an "aggrieved party" qualified to bring a complaint to the Commission pursuant to Rule 5:6.

Citing case law of the Virginia Supreme Court and the Commission, Virginia Power avers that Delta lacks the necessary personal, property, or pecuniary right or interest in the level of gross receipts paid by Virginia Power.

Virginia Power states that Delta's claim under the Virginia Antitrust Act fails for a myriad of reasons, including that the Commission lacks jurisdiction over such a claim.

Virginia Power responds to the claim that it has misused the Tax Credit by pointing to the actual language of § 58.1-2626.1.⁹ It states that it clearly meets the statutory requirements for claiming the Tax Credit because it is a corporation in the Commonwealth furnishing heat, light, or power to the Commonwealth or its citizens by means of electricity. Moreover, Virginia Power notes that the 2000 amendment requiring consumption of the coal supports its actions because the bill included a "grandfather" provision, providing that the new "and consumed" language is not applicable to contracts to purchase coal whose bid closing dates are before the bill was introduced.

⁹ Virginia Power filed its motion to dismiss before enactment of the amendment to § 58.1-2626.1. However, House Bill 1135 amending the statute had been passed by the General Assembly and was awaiting signature by the Governor at the time of Virginia Power's filing. As will be noted, Virginia Power's motion to dismiss also addressed the implications of this amendment to the statute.

Virginia Power also cites to the October 28, 1999, letter response to Delta's informal complaint by the then Director of the Commission's Division of Public Service Taxation, Mr. A. L. O'Bryan. In the Division's response, Mr. O'Bryan opined that:

the tax credit has been properly administered according to the provisions of § 58.1-2626.1 of the Code of Virginia. All Virginia Power purchases have been documented and certified as Virginia coal and have been purchased by an electric utility that is subject to the State gross receipts Tax (§ 58.1-2626) and eligible for the coal tax credit (§ 58.1-2626.1).

Finally, Virginia Power contends that Delta lacks standing to bring its constitutional claims, stating, among other things, that private parties are incapable of violating others' constitutional rights.

Delta filed a reply to Virginia Power's motion to dismiss the amended complaint. Claiming that Virginia Power has mischaracterized the basis of Delta's claims and the nature of the harm which Delta has suffered, Delta disputes Virginia Power's assertion that it lacks standing to bring an action before the Commission based upon Virginia Power's alleged misuse of the Tax Credit. Delta emphasizes its claims of disruption to the Virginia coal markets caused by Virginia Power's use of the Tax Credit and notes that it has not claimed any interest in the

amount of tax revenues lost by the Commonwealth due to the level of gross tax receipts paid by Virginia Power.

Delta also argues that Virginia Power mischaracterizes its claim "under" the Antitrust Act. Delta states that its claim here is not derived from the Antitrust Act itself but rather that Virginia Power's violation of the Antitrust Act triggers the Commission jurisdiction pursuant to § 56-35 to correct abuses by public service companies such as Virginia Power.

Regarding the actual language of the Tax Credit statute, Delta responds that the only logical construction of the phrase "doing the business of furnishing . . . power to the Commonwealth," in the context of the statute, is that a corporation is entitled to the credit when directly engaged in furnishing or supplying power to the Commonwealth when the power that is supplied is the basis for the claim to the Tax Credit. Delta avers that any other construction would render the limitation to power producers pointless.

Delta contends that the 2000 amendment to the statute confirms its position that the Legislature did not intend to extend the Tax Credit to purchases of coal for resale when it enacted § 58.1-2626.1.

Finally, Delta reasserts its Constitutional claims. It argues that the Tax Credit, as interpreted by Virginia Power, burdens interstate commerce and results directly in it suffering

economic damage. It also contends that Virginia Power has used the Tax Credit in a manner that violates the Equal Protection clause because Virginia Power's actions under the statute fail the "rational basis" test. Delta reiterates that both Constitutional claims raise concerns as to Virginia Power's performance of its public duties, warranting inquiry by the Commission pursuant to § 56-35.

Hearing Examiner Michael D. Thomas filed his Report on April 12, 2000, recommending that Delta's amended complaint be dismissed. The Examiner determined that Delta's entire case hinges on the threshold issue of whether Virginia Power was properly entitled to claim the Tax Credit provided by § 58.1-2626.1 of the Code of Virginia prior to its amendment which became effective for tax years beginning on and after January 1, 2001. He reasoned that if Virginia Power was entitled to take the Tax Credit, Delta's antitrust and constitutional claims are rendered moot for failing to state a claim for which relief can be granted. Thus, if there is no "misuse" of the Tax Credit by Virginia Power, there is no basis for these claims against the company.

The Examiner found that the plain language of the Tax Credit statute (prior to the 2000 amendment) does not prohibit the actions complained of in Delta's amended complaint. He observed that while the statute limits the class of corporations

that may claim the Tax Credit, it did not limit what those companies must do with the coal they purchased. The Examiner found that § 58.1-2626.1 affords the Tax Credit to water companies even though coal is not consumed in the water production or delivery process. He surmised that in enacting the statute in 1986 the Legislature may have been motivated more to stimulate the production and sale of Virginia coal rather than to provide a tax credit for Virginia public utilities.

In the Hearing Examiner's opinion, the 2000 amendment to § 58.1-2626.1 bolsters Virginia Power's arguments. He noted that the General Assembly clearly evinced its intent that the amendments are to be applied prospectively and they were not intended to impair any existing contract rights. Thus, this eliminated any claim by Delta that Virginia Power "misused" the Tax Credit by reselling Virginia-produced coal for which it had claimed the credit. Without the threshold "misuse," the Examiner could find no basis to support any of Delta's Antitrust, Commerce Clause, or Equal Protection claims.

The parties filed comments on the Hearing Examiner's Report on May 3, 2000. Delta took issue with the Examiner's statutory construction analysis and interpretation of the 2000 amendment to § 58.1-2626.1. The company also reiterated its claim that Virginia Power's use of the Tax Credit constitutes an abuse subject to correction by the Commission pursuant to § 56-35 and

that the Commission possesses the inherent regulatory authority to grant the relief Delta requested.

Virginia Power revisited the Tax Credit statutory language, including the amendment, and stated that the Examiner's analysis was correct. Virginia Power agreed the Examiner did not need to address the other claims given his resolution on the threshold issue. The company, however, offered additional arguments on the issue of standing and on the Antitrust Act and Constitutional claims in order to further support its motion to dismiss.

NOW THE COMMISSION, upon consideration of the parties' pleadings, the Hearing Examiner's Report and parties' comments filed thereto, and the applicable law, is of the opinion and finds that the Hearing Examiner's finding and recommendation should be adopted. We will grant Virginia Power's motion to dismiss Delta's complaint.

As § 58.1-2626.1 is written, Delta has pointed to no misuse of the Tax Credit by Virginia Power. Finding no misuse of the Tax Credit, we agree with the Examiner that our inquiry must come to an end. We recognize Delta's arguments that the Commission is charged with the express statutory duty to supervise, regulate, and control public service companies in all matters relating to the performance of their public duties, and

to correct any abuses by such companies.¹⁰ We may be obligated to exercise this authority even in instances where such abuses do not constitute acts that would otherwise support independent and discrete causes of action. In this case, however, we cannot find that conduct by Virginia Power that is consistent with a clear and unambiguous statute would warrant our taking such action.

Accordingly, IT IS ORDERED THAT:

(1) The recommendations of the April 12, 2000, Report of Hearing Examiner Michael D. Thomas are adopted.

(2) The motion of Virginia Electric and Power Company to dismiss the amended complaint of Delta Resources, Inc., is granted.

(3) The amended complaint of Delta Resources, Inc., is dismissed, and this matter is stricken from the Commission's docket of active cases.

¹⁰ Va. Code § 56-35.